

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
04-10319-WGY

UNITED STATES OF AMERICA

* TRIAL TRANSCRIPT
* (Volume 8)

NOEL HERNANDEZ

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BEFORE: The Honorable William G. Young,
District Judge

14 APPEARANCES:

DAVID TOBIN and NANCY RUE, Assistant United States Attorneys, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, on behalf of the Government

LAW OFFICES OF PARTRIDGE, ANKNER &
HORSTMANN, LLP (By Peter C. Horstmann, Esq.),
200 Berkeley Street, 16th Floor, Boston,
Massachusetts 02116, on behalf of the Defendant

GABRIEL HADAD and DEBORAH HUACUJA, Court
Interpreters

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23

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1 Courthouse Way
Boston, Massachusetts

s

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July 27, 2005

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1 PROCEEDINGS - 8:56 A.M.

2

3 THE CLERK: All rise. Court is in session, please

ease

4 be seated.

5 THE COURT: Good morning, counsel. We have tw

o

6 problems. The first is a juror problem. One of our ju

ror's

7 wife is in the emergency room.

8 THE CLERK: Mr. Westberry.

9 THE COURT: Mr. Westberry. Can we identify hi

m on

10 the jury?

11 THE CLERK: Yes. He sits in the second to the

last

12 row in the first seat.

13 THE COURT: All right. You mean the last row

--

14 THE CLERK: Second --

15 THE COURT: -- second to the last seat.

16 THE CLERK: I mean second to the last seat in
the
17 first row. I'm all right.

18 THE COURT: In the first row. All right.

19 THE CLERK: He sits right here. No. 6.

20 THE COURT: Yes. All right.

21 THE CLERK: He's the tall man with the glasses

22 THE COURT: So we recognize the juror. His wi
fe is
23 in the emergency room. I don't know why.

24 He's with her. Cell phones won't work in the
25 hospital. We've told him to be available to be contact
ed by

3

1 the Court at ten minutes after 9:00. I propose to dis
charge
2 him.

3 Let's start first with that. I propose to
4 discharge him. I have no reason to believe this is not
a
5 genuine emergency or that he left for some reason havin
g to

6 do with the deliberations. Is --

7 (Whereupon the Court and the Clerk conferred.)

8 THE COURT: Is there any objection?

9 MR. TOBIN: None from the government, your Hon
or.

10 THE COURT: Mr. Horstmann?

11 MR. HORSTMANN: No, your Honor.

12 THE COURT: Very well. He is discharged and

13 Ms. Smith may tell him.

14 Now, the question is what to do. Consistent w
ith

15 my charge and my preferred practice, I can send in the
first

16 alternate. The first alternate is Ms. Kieval, the lady
--

17 there are two alternates, one in the first row and one
in

18 the second. This would be the first row. And I would

19 instruct her to -- I would instruct them all to commenc
e

20 their deliberations afresh.

21 That's what I prefer. I have done it. It's

22 perfectly appropriate. The Rules of Criminal Procedure
also

23 allow a jury to continue with eleven. Now we're down t
o

24 eleven. Once they're deliberating. I prefer to send i
n an

25 alternate and have them start again and will so order.
But

4

1 I'll hear you.

2 Any objection to that?

3 MS. RUE: No, your Honor. No.

4 THE COURT: Mr. Horstmann?

5 MR. HORSTMANN: No objection to sending in an
6 alternate, your Honor.

7 THE COURT: That's how we will proceed.

8 Now, we haven't got them all yet. So that's h
ow

9 we're going to proceed.

10 Let's go to the second issue. I -- let me rum
inate

11 simply to set up for oral argument. Here I really need
oral

12 argument.

13 I've read both briefs and I've read them with
care.

14 I've had enough time to check United States v. Woods.
It

15 says exactly what the government says it says. It's
16 properly cited and it's properly cited in context.

17 I will tell you I find the government's brief
very

18 persuasive. I obviously thought in the Coppola case ab
out

19 what I was doing before I said those things that I said
post

20 trial whatever I had done in the heat of trial.

21 I -- that's one point. I find the government'
s

22 brief very persuasive.

23 There is no evidence here other than heroin.

24 There's no evidence of cocaine. Mr. Horstmann's refere
nce

25 to Rule 29 also resonates with the Court. You all

5

1 understand I'm not making rulings. I'm trying to get y
ou

2 set for oral argument.

3 But the law in the First Circuit is that

4 conspirators, and for substantive crimes, the offenders
have

5 to know that they're dealing with drugs. I'm also stru
ck

6 by, the statute of indictment speaks of Schedules I and
II.

7 Well, Schedules I and II have a recipe of drugs, but, f
or

8 instance, they exclude marijuana. If this were a marij
uana

9 offense, and some other drugs, but I use marijuana as a
n

10 example, he cannot be convicted. It's got to be a more

11 serious drug. And that would be a fatal variance, and

I

12 don't, I don't think the government disagrees with that

in

13 And then to tee it really up, Ms. Smith comes

ou

14 shortly before we come on the bench and says what are y

oral

15 going to do and I said I don't know. I'm going to hear

16 argument.

17 ntly

And so, in an effort to be transparent, freque

18 can

I come on the bench with a game plan, and oral argument

19 lan.

dissuade me from that. In all honesty I have no game p

20 I must and will adhere to the law.

f

21 It seems to me we're talking about the state o

--

22 mind of Mr. Hernandez. Now, if he agreed -- and to me

to

23 we'll start with conspiracy. If he agreed with others

24 deal in serious drugs like heroin, which may be the
25 appropriate thing to say, and then, and it doesn't have
to

6

1 be Navarro, it can be the unnamed people who are mentioned

2 in the testimony, then he can be found guilty of conspiracy.

3 If he agreed to aid or abet serious drugs -- well, the other

4 theory is conspiracy -- then he can be found guilty of they
5 actual importation of serious drugs. And I would know

6 had a reasonable doubt as to whether it was heroin if they

7 leave that blank. And I will say that. I've said enough.

8 Argument which suggests to me what I should say to

9 the jury will be helpful. I'll hear the government first.

10 MS. RUE: Your Honor, you had instructed the jury

11 previously that if there were to be an alternate you would

12 tell them stop your deliberations, start over from the
13 beginning.

14 THE COURT: And I will.

15 MS. RUE: The fact that we now have an alterna
te

16 gives this a perfect opportunity to start with a clean

17 slate. And I believe, your Honor, at this point you te
11

18 them to stop their deliberations, set aside out of thei
r

19 mind what they have deliberated on previously, and I pr
opose

20 at this point you provide them with the instructions th
at we

21 provided the Court.

22 THE COURT: Well, let's --

23 MS. RUE: Straight out of the First Circuit co
urt

24 case law.

25 THE COURT: All right, now, let's see here. W
ell,

7

1 you properly cite Woods. And let's take -- well, I

2 propose -- I'm with that subject to Mr. Horstmann's swe
rvings

3 me off it. And I'm with the second two proposals, the
cases

4 cited. But Woods, which I grant you they said it this
way

5 and they said it in this context, it's not -- the language
age

6 you want from Woods I can't, I don't think I can go the
re

7 because it encompasses marijuana. And you didn't indic
t

8 marijuana. In your broadest sense you indicted Schedule
es I

9 and II. That's what you did. But giving them a litany
of

10 the drugs won't help because there's only evidence of h
eroin

11 here. Maybe he didn't know heroin but he knew he had a
12 serious controlled substance. It would have to -- that
's

13 the language I'm, I'm, I'm groping toward, a serious, n
ot

14 that marijuana, you know, isn't serious, but in the com
mon

15 parlance we think of marijuana as a less dangerous drug
and

16 the penalties reflect that.

17 So, suppose I gave Woods, I don't want to say
need

18 only prove, that Mr. Hernandez had knowledge that he wa
s

19 dealing with a serious controlled substance, not that h
e had

20 knowledge of the specific controlled substance, in this

21 case, heroin. You're okay with that?

22 MS. RUE: Yes, your Honor, the government woul
d be

23 satisfied.

24 THE COURT: Yes. All right, Mr. Horstmann, fo
r

25 discussion purposes that's where I am.

8

1 MR. HORSTMANN: Well, I sort of came in this
2 morning prepared to complain if you hung me with a new
rope.

3 But be that as it may, I think -- I haven't read Woods
so

4 you have me at a disadvantage. Every other case that I
5 looked at on constructive amendment last night, and I l
ooked

6 at quite a few, quite a few, and the Second Circuit see
ms to

7 have wrestled with this issue quite a bit in terms of t
he

8 drug of conviction versus the drug of charge. In every
9 other case there was some evidence presented at trial o
f the

10 other drug. And the argument was whether the variance
was

11 so significant as to prejudice the defendant's rights.
I

12 don't know how we can instruct this jury that they can
come

13 back on any other drug.

14 THE COURT: We can't. We can't. That was err
or.

15 I'm backing off the mention of cocaine. I will specifi
cally

16 instruct the only, now, here, the only evidence we have
at

17 all is evidence of heroin. Whether you believe that or
not

18 is entirely up to you, but that's the only evidence we
have.

19 And, if you don't think that the, that the heroin was p
roved

20 beyond a reasonable doubt leave Question 3 blank. One,
I'll

21 know that that's what they think then. We'll deal with
22 sentencing if we ever get there.

23 MR. HORSTMANN: The only other thing I would
24 suggest then, your Honor, is, I don't believe they have
the
25 indictment. Do they?

9

1 THE COURT: They do not.

2 MR. HORSTMANN: And I think that might cure a

lot

3 of the questions that they had yesterday, but it also
4 creates some confusion because in your special verdict
form

5 I think you transposed --

6 THE COURT: I didn't transpose. I collapsed t
wo

7 counts.

8 MR. HORSTMANN: Yes. So, that's the only othe
r

9 suggestion I have.

10 THE COURT: Any objection to sending in the
11 indictment and saying that it's not, it's not evidence
of
12 course, but this is what the government's specifically
13 charged.

14 MR. TOBIN: Your Honor, ordinarily I would hav
e no
15 objection to sending in the indictment. In this case I
16 would because of the fear of confusion because --

17 THE COURT: I agree. I'm not sending in the
18 indictment. But Mr. Hernandez's rights are saved. I t
hink

19 I'm ready. If we -- why don't you step out and see if
we
20 have the jurors.

21 (Pause in proceedings.)

22 THE CLERK: Are we ready?

23 THE COURT: We are if you are. And bring the
24 alternates here and then we'll move Ms. Kieval.

25 THE CLERK: Okay. All right.

10

at 1 MR. HORSTMANN: Judge, may I be heard briefly

2 side bar before the jury comes in, there's something I
3 wanted to mention that I forgot.

4 THE COURT: Let me fix the alternate business,
then

5 I'll hear you --

6 MR. HORSTMANN: Okay.

7 THE COURT: -- rather than just run to the sid
e bar

8 as soon as I have them in the courtroom. I will hear y
ou

9 and then I'll give my charge.

10 THE CLERK: All rise for the jury.

11 (Whereupon the jury entered the courtroom at 9
:10

12 a.m.)

13 (Whereupon the Court and the Clerk conferred.)

14 THE CLERK: Court is in session, please be sea

ted.

15 THE COURT: Good morning, ladies and gentlemen

16 THE JURY: Good morning.

17 THE COURT: Let the record show that eleven of
the

18 twelve deliberating jurors and the two alternates are
19 present in the courtroom.

20 Let me start as I said I would yesterday, and
this

21 is very important, you are, each of you, on your oath a
s

22 jurors, including the alternates.

23 Since we recessed at 5:00 p.m. yesterday after
noon,

24 have any of you, including the alternates, heard, read
or

25 seen anything at all concerning this case? Have you

11

1 discussed this case with anyone? Have the deliberating
2 jurors discussed the substance of the case with the
3 alternates, or the alternates with the deliberating jur
ors?

4 Has anyone else discussed the substance of the case wit
h any
5 of you?

6 THE JURY: No.

7 THE COURT: The jury and the alternates answer
in

8 the negative.

9 All right. We're missing Mr. Westberry. He's
at

10 the emergency room with his wife. He's at the emergenc
y

11 room with his wife not because she's been in an acciden
t or

12 anything, but because she has been ill and wasn't respo
nding

13 well, he wanted her in the hospital. So they went to t
he

14 emergency room.

15 So the event which sometimes happens has now

16 happened, and we are going to substitute for Mr. Westbe
rry

17 the first alternate, which is Ms. Kieval.

18 So, Ms. Kieval, why don't you go up and take y
our

19 seat in the jury box.

20 That has the effect, ladies and gentlemen, as
I

21 told you at the outset of my charge that you start all
over

22 again. You just start from the beginning. Don't say t
o

er

23 Ms. Kieval we think this. Let her participate in the
24 deliberations. She is equal to the rest of you. Let h
25 participate in the deliberations and you start afresh.

12

1 I am ready to give you further guidance, but I
need

2 to talk with the lawyers for just one moment.

3 SIDEBAR CONFERENCE, AS FOLLOWS:

4 THE COURT: Yes, Mr. Horstmann?

5 MR. HORSTMANN: Yes. I had submitted an
6 instruction on mere knowledge which I did not press wit
h the

7 Court because I was happy with the association and --

8 THE COURT: Right.

9 MR. HORSTMANN: -- other parts of the Court's
10 charge. But I think now given the fact that --

11 THE COURT: Go ahead.

12 MR. HORSTMANN: -- it appears they're focused
on
13 knowledge, I will ask the Court to give a mere knowledg
e
14 instruction as well.

15 THE COURT: Noted, but I'm satisfied with the

16 charge.

17 But in that regard, I have the charge now in
18 writing. I propose to send the original charge in. No
19 objection?

20 MR. HORSTMANN: No objection.

21 MR. TOBIN: No, your Honor.

22 THE COURT: Very well.

23 (Whereupon the sidebar conference concluded.)

24 THE COURT: Since we're starting afresh, I thi
nk
25 there are two additional things that properly I can do
to

13

1 help you all.

2 First, Mr. Womack has prepared my charge in
3 writing. So you will have the written charge there in
the

4 jury room with you. I've got to go over it, it will ta
ke me

5 a few minutes to check it out, but then we'll send it i
n.

6 And I greatly appreciate his efforts in that regard.

7 I do have some additional instructions in lieu
of
8 directly answering your questions now that we're starti

ng

9 again. I do have some additional instructions about wh
at

10 the government has to prove with respect to conspiracy
and

11 knowledge since the jury as originally constituted seem
ed to

12 be focusing on that.

13 These instructions start by focusing on Questi
on 2,

14 the conspiracy to import heroin. The gist of a conspir
acy

15 is an agreement to disobey or disregard the law. To pr
ove

16 conspiracy the government does not have to prove that a

17 co-conspirator knew all of the details of a plan or

18 participated in all of the objectives of a plan. To pr
ove

19 conspiracy the government must prove beyond a reasonabl
e

20 doubt that Mr. Hernandez and at least one other

21 co-conspirator, if you think there was a conspiracy, on
e

22 other co-conspirator -- it may be Navarro, it could be
an

23 unnamed co-conspirator. If you believe a meeting in Ne
w

24 York took place. You have to believe these things beyo
nd a

25 reasonable doubt. But if you do, it doesn't have to be

a

14

1 witness, Mr. Navarro or Mr. Mercedes. It could be another

her

2 person. But the minds of Mr. Hernandez and that other

3 person must meet and they must agree, and here's the

4 language, they must agree, each one of them, that they

are

5 going to conspire to import a serious controlled substance.

nce.

6 Not that they have knowledge of a specific controlled

7 substance, but the conspiracy has to be a conspiracy, a

n

8 agreement to import as I've defined it a serious controlled

substance.

9 substance.

10 Note the change from yesterday. Yesterday I

11 mentioned another drug. Cocaine. Please strike that out.

12 And the reason is obvious. There's no evidence about

13 cocaine here at all. Don't start speculating about that

t.

14 There's no evidence in this case about cocaine. There's

s no

15 evidence in this case about any drug but heroin. And then

16 quite properly you may ask yourselves, because you're
17 focusing on Mr. Hernandez, did Mr. Hernandez know that
it
18 was heroin. For conspiracy there has to be an agreemen
t
19 between Mr. Hernandez and at least one other conspirato
r
20 where each one of them knew that they were conspiring t
o
21 import a serious controlled substance. Now, that inclu
des
22 heroin. It has other things, but I'm not going to ment
ion
23 them. Serious controlled substance is the concept.
24 If you have a reasonable doubt as to whether M
r.
25 Hernandez -- let's say you are convinced that he did

15

1 conspire and the conspiracy involved an agreement to im
port
2 a serious controlled substance, he may then be found gu
ilty
3 of conspiracy. He could be found guilty on the first c
harge
4 of aiding and abetting or by way of conspiracy found gu
ilty
5 on the first charge.

6 Again, by saying that I want also to say, if y
ou

7 have a reasonable doubt about any of those things he mu
st be

8 found not guilty of those charges. But if you have a

9 reasonable doubt about whether he knew that it was hero
in

10 leave Question 3 blank. We're not interested in quanti
ties

11 if there's a reasonable doubt that he knew that that's
what

12 it was.

13 Now, I think that those additional instruction
s are

14 sufficient under the circumstances. As reconstituted,
the

15 jury may retire to commence your deliberations afresh.
The

16 jury may retire.

17 THE CLERK: All rise for the jury.

18 (Whereupon the jury left the courtroom at
19 9:20 a.m.)

20 MR. TOBIN: Your Honor?

21 THE COURT: Please be seated. Yes?

22 MR. TOBIN: In addition to the instructions th
at

23 have been typed up and transcribed from yesterday, woul
d it

24 be possible to have today's supplemental instructions s
ent

25 in as well when they're complete to be --

16

1 THE COURT: It would and that makes good sense

2 It's just a functional matter and we'll lean on Mr. Wom
ack.

3 When, when they're prepared and I have reviewed them th
ey

4 may be sent in.

5 MR. TOBIN: Thank you.

6 MR. HORSTMANN: For the record, Judge, I objec
t to

7 the instruction you just gave and it being sent in.

8 THE COURT: Since you had no objection to the
--

9 oh, you just don't like the instruction the way I frame
d it.

10 MR. HORSTMANN: I don't like it.

11 THE COURT: Very well. Your rights are saved.
And

12 I'm not so sure that objection is timely now that I let
the

13 jury go out. But it's certainly timely as to sending i
n the

14 supplementation and I am going to send in the
15 supplementation. Your rights are saved.

16 MR. TOBIN: Your Honor, one additional matter.

I
17 apologize. Although unusual, I'm going to ask that the
18 Court consider revoking the conditions of the defendant
's
19 release during pendency of the deliberations.

20 THE COURT: That is unusual. I have done it.

But

21 I decline to do that.

22 MR. TOBIN: Thank you.

23 THE COURT: He's been faithful in his attendance
ce on
24 the Court, and I don't think these questions suggest
25 anything particular, and indeed, I have a reconstituted

17

1 jury.

2 MR. TOBIN: Thank you, your Honor.

3 THE COURT: So the questions are of less moment.
t.

4 We'll recess.

5 THE CLERK: All rise. Court is in recess.

6 (Recess.)

7 THE CLERK: All rise for the jury.

8 (Whereupon the jury entered the courtroom at
9 10:17 a.m.)

10 THE CLERK: Court is in session, please be seated.

11 jury Madam Forelady, members of the jury, has the jury

12 reached a unanimous verdict?

13 THE FORELADY: We have.

14 THE CLERK: Please pass the verdict slip.

15 (Papers passed.)

16 THE COURT: The verdict is in order, it may be
17 recorded.

18 y and THE CLERK: Madam Forelady, members of the jury

19 s the alternate, please stand and listen to the verdict a

20 Court records it.

21 Noel In the case of the United States of America v.

22 Hernandez.

23 d On the charge of importation of heroin, we find

24 Noel Hernandez guilty.

25 we On the charge of conspiracy to import heroin,

1 find Noel Hernandez guilty.

2 There is attributable to Noel Hernandez 874 gr
ams

3 of heroin.

4 Was Noel Hernandez an organizer and manager of
a

5 criminal enterprise involving less than five people? Y
es.

6 So say you, Madam Forelady, so say you, member
s of

7 the jury?

8 THE JURY: Yes.

9 THE CLERK: Thank you. Please be seated.

10 THE COURT: Please be seated.

11 Ladies and gentlemen, I want to thank you. I
thank

12 you not for your verdict. I would thank you whatever y
our

13 verdict was. I want to thank you for the care, the
14 attention, the courtesy, the promptness, your obvious
15 involvement in this case.

16 By your verdict you've spoken the truth about
these

17 charges. You're now free to go and free to talk to any
one

18 about anything having to do with this case. In one respect,

19 I urge you, I cannot charge you, but I urge you, now that

20 you're at the end of your jury service, don't talk about

21 what went on in the jury room. That's private to the twelve

22 of you. Your verdict expresses your unanimous view.

23 The litigants, the lawyers, no one can approach you

24 having to do with your verdict. The press might. You don't

25 have to talk to them. And it's best that you not talk about

19

1 what went on in the jury room.

2 I would like to thank you personally. So if you'll

3 just stay in the jury room for just one moment, I'll be

4 right back there.

5 The jury may retire. I'll remain on the bench

6 THE CLERK: All rise for the jury.

7 (Whereupon the jury left the courtroom.)

8 THE COURT: Please be seated.

9 Bail is revoked. Mr. Hernandez is remanded to

the

10 custody of the marshal.

11 I propose sentencing for the 24th of October a

t

12 2:00 p.m. Is that satisfactory to the government?

13 MR. TOBIN: It is, your Honor.

14 THE COURT: And Mr. Horstmann, is that

15 satisfactory?

16 MR. HORSTMANN: I think my wife just bought pl
ane

17 tickets for that day.

18 Yes, your Honor, I'll be out of state.

19 THE COURT: Out of state that day.

20 THE CLERK: October 18th.

21 THE COURT: How about the 18th at 2:00?

22 MR. HORSTMANN: That's fine, your Honor.

23 THE COURT: Satisfactory?

24 MS. RUE: Thank you, your Honor.

25 THE COURT: So ordered. We'll recess.

20

1 THE CLERK: All rise. Court is in recess.

2 (Adjournment.)

3

4

5 C E R T I F I C A T E

6

7

8 I, Donald E. Womack, Official Court Reporter f

9 the United States District Court for the District of

or

10

Massachusetts, do hereby certify that the foregoing pag

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and ability.

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